

To: Robert Dean  
Chief of Party  
Jordan Rule of Law Project  
Tetra Tech DPK

From: Robert Carolan  
Consultant  
Creation of Jordan Constitutional Court  
29 February 2012

Re: **Trip Report**

### **SCOPE OF ASSIGNMENT**

My assignment in Jordan was to provide support to the government of Jordan in drafting the constitutional court law. Specifically, I was asked to:

1. Meet with relevant ministers (including Minister of Legislative Affairs, Minister of Legal Affairs, Ministry of Justice) and government officials to understand their vision with regard to the to-be established Constitutional Court.
2. Review the draft constitutional law developed by the Jordanian government as well as other documents available and provide feedback and input.
3. Share international models and best practices and provide presentations when necessary on the different aspects of the mandate, governance and operations of constitutional courts.
4. Liaise as necessary with other ROLP staff or external consultants.
5. Other duties assigned by project management staff related to this consultancy.

It was my understanding that as part of the comprehensive political, social and economic reform Jordan is witnessing, several constitutional amendments were enacted to support reform efforts. With respect to the judiciary, said amendments have both legal and structural impact on the justice system. Among said amendments are those related to the establishment of a constitutional court. Prior to the amendments, and despite that the constitution of Jordan had not provided expressly for the existence of Judicial Review in the kingdom, it was well understood by the constitutional legislator that judicial review is very essential for assuring the principles of legitimacy and supremacy of the constitution.

Therefore, and despite the absence of a constitutional court in Jordan in the past, article 9 of the High Court of Justice's Law provided for controlling the constitutionality of laws through the ancillary appeal of judgments or through the court abstaining from implementing the unconstitutional law. The unconstitutional law, however, stays effective in the absence of a constitutional court, since the decision of a court not to enforce the law in a certain case does not prevent its application in other cases. This jeopardizes the right of individuals to a fair rule of law, as the constitutional court is the only competent court to repeal an unconstitutional law and can revoke any unconstitutional action.

The recent constitutional amendments clearly stipulated the establishment of a constitutional court, whereby article 58 of the Constitution states the following:

1. A Constitutional Court shall be established by a law in the Hashemite Kingdom of Jordan and shall be based in Amman. It will be an independent and separate judicial body, and shall consist of a minimum of nine members, including the president, appointed by the King. The quorum of Court's sessions will be present when seven of its members at least including the president, and in his absence, his deputy presides the session. The rulings and decisions of the Court are issued by the majority of six of its members at least.
2. The term of membership in the Constitutional Court is six years, not subject to renewal.

In terms of its mandate, article 59 of the Constitution states the following

1. The Constitutional Court shall monitor the constitutionality of laws and regulations in force and issue its judgments in the name of the King. Its rulings are final and binding on all authorities and all. Its rulings will take effect immediately unless another date is specified by the ruling. The Constitutional Court's rulings will be published in the Official Gazette within fifteen days from the date of issuance.
2. The Constitutional Court has the right to interpret the provisions of the Constitution if so requested either by virtue of a decision of the Council of Ministers or by a resolution taken by the Senate or the Chamber of Deputies passed by an absolute majority. Such interpretations shall be effective upon publication in the Official Gazette.

### **My Role in This Visit**

Currently, the government is in the process of drafting the necessary laws and amending pertinent legislations to support implementation of the constitutional amendments. Among said laws is the constitutional court law that needs to be issued prior to the court's establishment.

To this end, the government requested support from the USAID funded Rule of Law Program (ROLP) to provide technical expertise in the area of constitutional law to draw on regional and international experience in this field.

The USAID funded Rule of Law Project (ROLP) works to: provide direct technical assistance to strengthen judicial independence, improve Cassation Court's ability to render final appeal decisions, improve the efficiency and transparency of court services to Jordanian citizens and lawyers, strengthen the skills and knowledge of judges and court staff, and generally support the judicial implement its strategic plan for 2012-2014. My role was to assist the Project with my background, experience and expertise.

### **My Background With A Constitutional Court**

Since June, 2009, I have served as an international judge on the Constitutional Court of the Republic of Kosovo, the newest constitutional court in the World in the second newest sovereign state in the World. There are nine judges on the Court, six national and 3 internationals. In its first two and half years the Court has rendered several judgments and reviewed more than 500 referrals. It has referenced the jurisprudence of other constitutional and human rights courts in the World.

I have served as an appellate judge on the State Court of Bosnia and Herzegovina, an international judge with thverae United Nations Mission in Kosovo and as Chairperson of the Kosovo Judicial and Prosecutorial Council. I have also served as a trial court judge in the State of Minnesota for 24 years and as a public prosecutor for 17 years.

### **Relevant Materials That I Reviewed**

In preparation for this assignment I was provided with copies of Articles 6, 7, 8, 9, 15, 16, 18, 20, 27, 42, 45, 50, 54, 55, 56, 57, 58, 59, 60, 61, 67, 71, 73, 74, 75, 78, 84, 88, 89, 94, 98, 100, 101, 109, 112, 119, 122, 128 as amended. Articles 58, 59, 60 and 61 pertain specifically to the creation of the new constitutional court in the Hashemite Kingdom of Jordan. I was also provided with a 33 page report with 101 specific topics describing the current legal and judicial system in the Hashemite Kingdom of Jordan.

I have also reviewed all articles of the Constitution of the Hashemite Kingdom of Jordan in addition those listed above that have been recently amended.

### **During this visit I met and visited with the following people:**

Dr. Ahmad Ziadat, Director of Legislation and Opinion Bureau

1. We discussed whether the Constitutional Court should allow dissenting and concurring opinions and fact that existing courts in Jordan allow for such a procedure.
2. We discussed whether the Constitutional Court of Kosovo allowed hearing and evidence gathering procedures whether such procedures should be adopted by the new Constitutional court.
3. We discussed the issue of how successor judges would be appointed after the original judges' mandate expired in 6 years and could not be re-appointed. We discussed the possibility of enacting legislation for the creation of additional judgeships of more than the minimum 9 on the court to commence at later dates than the appointment of the original 9 judges. This approach would prevent all of the judges having to leave the Court at the same time with the subsequent appointment of a totally new court and would enhance the stability and continuity of the jurisprudence of the Court. It was suggested that the legislation should expire after a staggered rotation of judgeships had been created on the Court to prevent or reduce ability to forever expand the number of judges on the Court unless there was a documented case load increase justifying such a permanent increase. Consideration should be given to this approach to minimize the appearance that the appointing authority was compromising the independence of the Court.
4. We discussed the need that all judges on the Court have equal power and authority and that, with the exception of limited administrative powers, the President and Deputy President should not have greater powers on the Court than the remaining judges.
5. We discussed how other jurisdictions can refer constitutional questions to the constitutional court.
6. We discussed how referrals to the Court are processed and how that process is managed and controlled with review panels and the relationship of the review panels to the full court as well as the role of the reporting judge.

7. We discussed how and who screens candidates for appointment to the Constitutional Court.

I found the meeting with Dr. Ziadat to be very helpful.

His Excellency, Salim Al-Zou'bi, Minister of Justice

We discussed:

1. who appoints and screens applicants to be judges on the Court?
2. the role of Minister of Justice with the Court?
3. who can appear before the Court?
4. whether the Court has hearings, and if so, who appears?
5. who decides on who appears. Does the Court do it solely upon its own discretion?
6. the jurisdiction of the Court.
7. the caseload of the Court.
8. the key issues that the Court has confronted.
9. whether a Solicitor General/ Public Attorney regularly appears in the Court.
10. the qualifications of judges to serve on the Court.
11. who appoints judges of the Court and whether there is a gap in the current Constitution with respect to the appointment process.
12. who, if anybody, presents a "shortlist" of final candidates to the appointing authority?
13. whether there is a need for staggered terms of the judges appointed to the Court.

These discussions were helpful.

His Excellency, Mohammad Al-Mahameed, Chief Justice of Cassation Court of Jordan:

We discussed:

1. The need for judicial reform and enforcement of constitutional rights;
2. That laws have to be clear and understood;
3. That the High Court of Justice would be abolished;
4. The Constitutional Court must be totally independent; and,

5. Who decides on how individual applications are made to the Constitution Court.

The discussion with the Chief Justice was warm and courteous as he had to leave to attend the funeral of a former colleague.

Ms. Christina Maria Hoss, consultant with Max-Planck Institute of Comparative Public Law and Public International Law

We discussed:

1. Her hope that there not be much outside interference in the process by common law jurisdictions and,
2. She knows what the draft law on the constitutional court basically will address, and that it will be ready for release within the next couple of days.

This discussion was helpful and perhaps a good introduction for the Project to team up with her in terms of the technical assistance the Government may need in drafting the legislation.

His Excellency, Ayman Odeh, Minister of State for Prime Ministry Affairs and Legislation:

The Minister asked that we review and comment on the proposed legislation on the law of the constitutional court once it is submitted to us, which he anticipated would happen within the next couple of days.

The Minister also asked that we submit a comparison study of:

1. the number of judges on constitutional courts worldwide,
2. the length of their terms and
3. whether the terms are renewable.
4. whether other constitutional courts limit the jurisdiction of the court with respect to what it can review. Is it just constitutionality of laws and regulations? Can they review old laws or just new ones? Can they subsequently declare unconstitutional a law that they initially declared constitutional?
5. Can they supervise the constitutionality of a law before it is enacted?
6. Can constitutional courts supervise the separation of powers by different governmental agencies?
7. Can constitutional courts decide an individual constitutional right or question without it occurring in pending legislation?

8. To what extent can constitutional courts determine whether a treaty is constitutional? Is it limited to only those cases where the treaty affects the rights of the citizens?
9. Do courts give advisory opinions on proposed actions of government officials or others before they act?
10. Should the government appear in every case before the Constitutional Court?
11. What is the general composition of members of the Court?
12. Are interim measures imposed a normal action of the Court? If so, under what conditions?
13. Do constitutional courts try government ministers accused of crimes or wrongdoing?
14. Do constitutional courts define the nature and extent of immunity that government officials possess?
15. What should be the minimum number of court members?
16. Terms of service/set terms *vis a vis* life service
17. Renewable terms or not
18. Review of proposed legislation/ prior to enactment. Is this a common practice?
19. Review of legislation after enactment – common/best practice?
20. Review of previously passed laws (prior to Constitutional court)? Common/best practice?
21. Supervision/review of government actions
22. Supervision/review of Decrees, laws, regulations?
23. Supervision/review of government actions.
24. Disputes between governmental authorities.
25. Who can bring a claim:
  - a. Cabinet
  - b. Senate
  - c. Deputies
  - d. Judicial Council?
  - e. Interested bystanders
  - f. Actual case claimants/parties
26. Supervision/review of treaties –

Some require parliamentary passage. Can court review if treaty needed parliamentary approval to be valid? Oversight of ratification process.

27. Composition of the Court – best practices

28. Taking of evidence at Constitutional Court level – best practices.

Full notice to parties

Opportunity to be heard/contest.

29. Power of court –

Declares null and void

Interim measures pending final judgment – best practices and common usage

- i. Standards for invoking this power – “in the public interest” – “irreparable harm/damage”

30. Governmental or Parliamentary petition to court – processes – service- notice.

a. Ability of claimant to withdraw

b. Role, if any, of the court in allowing a claim to be withdrawn once filed.

31. Advisory opinions – best practices – how common?

For example, the Ministry asks – “Can we do this particular act?”

32. Art. 59.2 – Power and right to interpret. What is the Constitutional Court’s authority in this Article

a. Revealing vote/split

b. Dissenting opinions

- i. Policy decision as to advisability of this. Advice. Arguments pro and con

1. Transparency

2. Does it erode or strengthen the majority opinion.

3. Fostering public debate

4. Enhance or detract from the authority and stability of the court.

34. Impeachment – What role, if any, should Constitutional Court play.

35. Prosecution for criminal actions of government official

36. Immunity – What immunity to be given – best practices – recommendation.

The meeting with Minister Odeh was extremely helpful and requires some more work in responding to his questions and his request that the Project review the proposed draft legislation.

#### Meeting with some members of the Chamber of Deputies:

In this meeting there was discussion about the role of the Court, what cases should be heard by it and how should they be presented. There was discussion about whether the Court should be able to act on its own initiative, rather than waiting for a question to be referred to it, in interpreting the Constitution. The meeting provoked many questions and demonstrated a keen interest by the Deputies in the meeting of their role in drafting the legislation on the Court.

This meeting was very helpful and demonstrated that there is strong interest in many sectors with respect to this legislation.

#### **Impression of Status of Pending Legislation**

I believe that the draft legislation will be proposed within the next couple of days and that the two legislative bodies will probably act upon it very quickly.

#### **Commentary on Relevant Constitutional Articles and Potential Problems**

The relevant Constitutional Amendments applicable to the establishment of the Constitutional Court, Article 58, Article 59, Article 60 and Article 61 appear to establish the framework for the law on the constitutional court and the scope and authority of the Court.

#### Article 58

Article 58 could be problematic to the extent it establishes a Court membership of a minimum of nine members but does not establish a maximum number of judges to be appointed. Conceivably the appointing authority could, therefore, appoint an unlimited number of judges to the Court and thereby alter its effectiveness and/or independence. If that were to happen, there could at least be the appearance that the appointing authority was attempting to compromise the Court's independence. The power of the Court depends upon the public's perception of its independence and impartiality. Since the power of the Court depends on the public perception, this could become a problem area in the future affecting its perceived legitimacy.

The term of the judges on the Court is a relatively short period of six years. For stability and maximum productivity from the judges appointed to it, it probably should be longer. Also, it probably will result in many of the judges appointed to the Court to have to contemplate a professional or public career after their term on the Court expires. Because of the public and political sensitivity of many issues presented to the Court, many of the judges may feel that their judicial independence will be compromised if they render a politically unpopular decision. Because they will have to worry about their professional careers later, they may feel undue pressure to render a decision that is less than totally independent, impartial and professional.

The judges cannot be dismissed during their mandate. There probably should be some restrictions on this absolute prohibition. If the judge refuses to work, he or she should be subject to

discipline or removal. If the judge commits a serious breach of his duties or is convicted of a serious crime, he or she should probably be subject to removal from office.

#### Article 59

This Article states that the Court shall “monitor” the constitutionality of laws and regulations but does not say how, implying that the Court on its own initiative without a referral or a question being submitted to it by an authorized party, it could render constitutional judgments. This might need some clarification especially because Article 60 specifically states that only certain designated officials, and some individuals, if a court deems the question justified, can ask questions of the Constitutional Court for a constitutional interpretation. It could be interpreted that because Article 60 limits who can ask a question of the Constitutional Court, that the Court cannot act unless one of the designated parties set forth in Article 60 asks a question of the Court. On the other hand, it could also be argued that Article 60 merely restricts who can ask a question of the Court, but it does not restrict the Court from acting on its own initiative, particularly when Article 58 states that the Court “shall monitor.....”

#### Article 60

Article 60 (2) appears to give an individual citizen (subject in the Kingdom) the right to petition the Constitutional Court if he or she has a matter before the “courts” and if a court deems the question “justified.” This provision is somewhat ambiguous. What does this term mean? Who in the court system decides what it means? Why should any institution other than the Constitutional Court decide whether a party has a “justified” constitutional claim? If another institution or court other than the Constitutional Court decides this question, a court or institution other than the Constitutional Court will decide whether the Constitutional Court should decide a constitutional question. In view of the mandate in Article 59 that the Constitutional Court “shall monitor” the constitutionality of laws and regulations, this provision appears to be inconsistent. It could also appear to establish a substantially different standard for individuals to obtain a constitutional review of a law or regulation than for the Court on its own or certain government officials. This could create the appearance that the Court has limited authority and independence at least with respect to individuals. It also raises a question of fundamental fair treatment for a private citizen *vis a vis* a government official.

#### Article 61

Article 61 has characteristics of many other constitutions in terms of qualifications of prospective judges. It does, however, state that a law will define the immunity of the judges on the Court. This provision could be in conflict with Article 58 which states categorically that the judges cannot be dismissed. Assuming that it is referring to either criminal or civil liability of the judges, that immunity should be defined in the Constitution, not in a separate law. A law could be quickly and easily changed to expose a judge or judges on the Court to liability simply because their decisions are no longer popular. In such circumstances, the independence and impartiality of the judges on the Court could be quickly and easily compromised. If the standard of immunity, which should be functional only,

is written in the Constitution, it is less likely to be changed so as to compromise the independence of the judges of the Court.

Article 61 (3) is poorly written and also appears to compromise judicial independence. The judges of the Court, not the Government or Parliament, should enact their rules of procedure on how their Court will carry out its business. Certainly, the language that refers to a law being passed relating to the “rulings and decisions” of the Court appears to compromise judicial independence.

#### **Key Areas to Be Resolved**

My four major areas of concern are:

- (1) access to the Court;
- (2) the transparency in the appointment process ;
- (3) the independence of the Court; and,
- (4) the stability of the Court in the re-appointment process of new judges.

Some of those concerns can be partially resolved in the anticipated new law on the Court. Others may have to be addressed in constitutional amendments at a later date.

#### **How I Could Continue to Assist the Project**

- (1) I am willing to review any draft law on the Court and to assist in any re-drafting if necessary.
- (2) I also plan to attempt to answer the research questions that Minister Odeh specifically asked for help.
- (3) I should also be able to assist with the drafting of any rules of procedure and the creation of an organizational chart for the new court including job descriptions of the Court staff.
- (4) I could also assist in trying to arrange a court visit either by other officials of the Constitutional Court of the Republic of Kosovo to Amman or a similar visit by appropriate officials of the Kingdom to Kosovo.

It has been a pleasure to work with you and your excellent staff on this Project.

Robert Carolan  
29 February 2012

